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Supreme Court of the United States

June Term, 1940

JOSEPH J. MASCUCH,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

No. 1058 116

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Notice of Filing.

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JOSEPH J. MASCUCH,
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No. .....

Sir:

PLEASE TAKE NOTICE that in the above entitled cause a petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, and brief in support thereof, a true copy of which is annexed, together with the requisite copies of the printed record, were filed in the office of the Clerk of the Supreme Court of the United States on the day of May 1940, and are now pending before the Court.

New York, N. Y., May 27th, 1940.

Yours, etc.,

HARRY W. COLMERY,
Topeka, Kansas,
FRANK L. MILLER,
70 Pine Street,
New York, N. Y.,
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To:
Hon. FRANCIS BIDDLE,
Solicitor General,
Washington, D. C.

Service of a copy of the foregoing notice and of the within petition for writ of certiorari and supporting brief, as well as of a copy of the printed record (including the proceedings in the United States Circuit Court of Appeals for the Second Circuit), is hereby admitted this day of May, 1940.

Counsel for Respondent.

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No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the Supreme Court of the United States and Associate Justices thereof:

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, which decision was rendered on the 6th day of May, 1940, affirming the judgment of conviction of the United States District Court for the Southern District of New York at the Borough of Manhattan, City and State of New York, convicting the petitioner of perjury, in violation of Title 18, United States Code, Section 231.

Statement of the Matter Involved.

Petitioner, President of Breeze Corporations, Inc., a company engaged since 1926 in the manufacture and distribution of aeroplane parts and equipment, riot guns, tear

gas and other related products, a good portion of which it sells to the United States Government Army and Navy Air Corp. (R. 579), with an annual payroll amounting to approximately $1,000,000 (R. 583), having between 1,500 and 1,700 stockholders (R. 321) and whose stock is listed upon the New York Curb Exchange, was heretofore and on the 14th day of June, 1939 indicted on two counts, charged with having committed perjury in violation of Section 125 of the Criminal Code (18 U. S. C. A., Sec. 231) in an investigation conducted by the Securities and Exchange Commission involving transactions in Breeze Corporations, Inc. stock upon the New York Curb Exchange during the period between October 1st, 1938 and March 25th, 1939. The alleged perjurious testimony almost entirely related to matter antedating that fixed period.

Petitioner went to trial herein on November 14th, 1939 and was convicted on November 29th, 1939 on both counts of the indictment. He was sentenced to imprisonment for two years and to pay a fine of $2,000 on each of the two counts of the indictment, the prison sentences on both counts to run concurrently.

Petitioner appealed from the judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit which resulted in a unanimous affirmance with opinion by SWAN, C. J.

Upon the trial, petitioner attacked for insufficiency each assignment of perjury in both counts by moving for a direction and dismissal both at the close of the Government's and the entire case. The application was in all respects denied (R. 482-520; 638-640). Notwithstanding, that the application was treated by both Court and counsel as a motion for the withdrawal of said assignments from the consideration of the jury and that the Circuit Court in its discretion might have regarded it as such, the Circuit Court

held it would not regard the motion so made as equivalent to a motion to withdraw.

During the course of the trial, substantial legal questions were raised by petitioner and by reason of their rejection, reversible error was committed as follows:

Petitioner offered in evidence Defendant's Exhibit A for Identification (R. 927). The rejection of that document prevented petitioner from presenting to the jury for its consideration, evidence of absence of wilful intent to swear falsely by the offer in that document to correct his testimony. It served to deprive petitioner of an opportunity to corroborate the witness Palmer called by the defense and who gave direct positive evidence as to the making of the agreement set out in the document. The rejection was particularly grievous in that the Government had been given wide latitude on that score and petitioner should have been accorded an opportunity to show subsequent acts and declarations as bearing on the important element of intent.

Several of the character witnesses called by the defense were cross examined over objection and exception upon collateral and irrelevant matter which in nowise was related to defendant's reputation for truth and veracity (R. 293-569; 575). In one instance, the Government having opened a new field of inquiry on cross examination sought to impeach the character witness by producing and reading into evidence portions of that witness's testimony given before the United States Grand Jury (R. 523-536).

Upon cross examination (R. 589-634) of the witness Palmer, called by the defense, the Government, over objection and exception and the Trial Court's admonition that the course was dangerous, was permitted to develop upon the claim that such testimony would affect the witness's credibility, a line of inquiry which failed to discredit the

witness but which imputed both to the defendant and said witness the commission of other crimes and offenses.

During the course of the trial there was comment by juror No. 4 which the Trial Court labelled improper. Petitioner urged that the usefulness of that juror, particularly following questioning and admonition by the Court, had been impaired to the extent that petitioner could not receive a fair trial by an impartial jury, yet his motion for the withdrawal of a juror and a mistrial was denied (R. 267-275).

Upon the trial, evidence was given by both sides respecting the making of an agreement between petitioner's counsel and the Securities and Exchange Commission Examiner whereby defendant would be accorded the right to examine the transcript of his testimony (upon which this perjury indictment is based) for the purpose of correcting errors, inaccuracies or omissions before he became bound thereby. Although the examiner who testified for the Government denied the making of the agreement, the evidence, as bearing upon the element of intent, offered by both sides was submitted to the jury. Upon this issue, at petitioner's request the Court charged in substance (R. 706) that if they found such an agreement or stipulation to have been entered into, and that the defendant believed such right existed and that if he gave his testimony in good faith in reliance thereon, he was entitled to an acquittal. But the Court refused to charge its corollary, viz., that even if the jury found that no agreement or stipulation such as claimed by the defendant was entered into but the other circumstances existed and were found, then the defendant was entitled to an acquittal. This was tantamount to an instruction to the jury that before they could acquit the defendant notwithstanding the absence of corrupt motive and wilful intent, they must find as a fact the existence of the agreement granting the defendant the right to correct his testimony.

The refusal of the Trial Court to charge as requested (R. 701) to the effect that evidence of the defendant's good character of itself, if believed by the jury, is sufficient to create a reasonable doubt where otherwise no reasonable doubt would exist, was, as your petitioner shall demonstrate in the supporting brief, reversible error but the Court's main charge (R. 721) was tantamount to an instruction that evidence of good character must outweigh the positive evidence in the case to entitle petitioner to the benefit of any reasonable doubt which might thereby be created. Over objection and exception, the Trial Court permitted evidence of petitioner's acts and declarations after the date fixed in the indictment wholly unrelated to the crime charged and which imputed to the petitioner the commission of other crimes.

Your petitioner respectfully submits that the foregoing errors are not only serious, substantial and prejudicial but have had the cumulative effect of depriving your petitioner of a fair trial by an impartial jury in violation of petitioner's constitutional rights which ought to be reviewed by this Court.

Questions Involved.

(1) Did the Circuit Court err in affirming the judgment of conviction?

(2) Did the Circuit Court err by its refusal to exercise its discretion and treat the motions for dismissal and direction as motions for withdrawal?

(3) Does the erroneous submission of any one assignment of perjury in each of the counts of the indictment require a reversal of the conviction?

(4) Was the defendant deprived of a fair trial by an impartial jury by reason of (a) the refusal of the Trial Court to charge as requested respecting the probative effect of evidence of good character, (b) the improper and prejudicial cross examination of character witnesses called by petitioner, (c) the improper and prejudicial cross examination of the witness Palmer called by petitioner, (d) failure of the Trial Court to charge as requested by petitioner respecting criminal intent and corrupt motive notwithstanding a negative finding by the jury as to the making of the agreement reflected in the Defendant's Exhibit A for Identification, (e) the circumstantial evidence and testimony by inference of petitioner's subsequent acts and declarations, imputing to petitioner the commission of other unrelated crimes, permitted over objection and exception, and (f) the misconduct of juror No. 4, labelled improper by the Trial Court?

Assignment of Errors.

It is respectfully submitted that the Courts below erred by giving in effect negative answers to each and every one of the questions formulated in the preceding paragraph.

Statute Involved.

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

Reasons for Granting the Writ.

(1) The Circuit Court below by affirming the judgment of conviction, sanctioned the Trial Court's charge, and its failure to charge, as requested by petitioner, on the question of probative effect of evidence of defendant's good character which is

a. in direct conflict with the decision of this Court—*Edgington* v. *United States,* 164 U. S. 361, and

b. in direct conflict with the decisions of the other circuits on the same matter, viz., *Roth* v. *U. S.* (6th Circuit) 294 Fed. 475; *Snitkin* v. *U. S.* (7th Circuit) 265 Fed. 489; *Egan* v. *U. S.,* D. C., 287 Fed. 958, although it is supported by *Kreiner* v. *U. S.* (2nd Circuit) 11 Fed. (2d) 722; *Kaufman* v. *U. S.* (3rd Circuit) 282 Fed. 776; *Grace* v. *U. S.* (5th Circuit) 4 Fed. (2d) 658; *Warren* v. *U. S.* (8th Circuit) 250 Fed. 89, and *Joyce* v. *U. S.* (9th Circuit) 294 Fed. 665.

(2) This conflict presents in and of itself an important question of Federal Criminal Law which should be settled by this Court.

(3) The holding by the Circuit Court of Appeals in and for the Second Circuit (*Kreiner* v. *U. S.* (*supra*)), "that evidence of the defendant's good character in and of itself, if believed by the jury, is not sufficient to create a reasonable doubt where otherwise no reasonable doubt would exist", is in conflict with the applicable local [New York] decisions (*People* v. *Marcus,* 236 A. D. 93; *People* v. *Gilbert,* 199 N. Y. 10; *People* v. *Millard,* 247 A. D. 253; *People* v. *Ulman,* 258 A. D. 262; *People* v. *D'Anna,* 243 A. D. 259) and thus calls for an exercise of this Court's power of supervision in

accordance with the doctrine announced in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

(4) The Circuit Court departed from the accepted and usual course of judicial proceedings, sufficient to call for an exercise of this Court's power of supervision, when it refused to exercise its discretion and treat the motions of petitioner for direction and dismissal at the close of the Government's and entire case, as motions for withdrawal, particularly since it appears that counsel and the Trial Court treated them as such, in arguing said motions addressed to each and every specific assignment of perjury in each of the two counts. The Circuit Court's failure to do so constitutes an abuse of discretion. Section 269, Judicial Code, 28 U. S. C. Section 391; *Crawford* v. *U. S.,* 212 U. S. 183.

(5) The Trial Court's rejection of Defendant's Exhibit A (R. 927) for Identification deprived the petitioner, among other things, of a fair trial, for he was prevented from presenting for the jury's determination, evidence of absence of wilful intent to swear falsely through the offer by said document to correct his testimony. The denial of that right is in conflict with the applicable decision of this Court. *U. S.* v. *Norris,* 300 U. S. 564. It likewise deprived defendant of an opportunity to corroborate the witness Palmer. *Peo.* v. *Epstein,* 245 N. Y. 234. In addition, since the Government was given wide latitutude on that score, defendant should have been permitted to show subsequent acts and declarations as bearing on the question of intent. *Shreve* v. *U. S.,* 103 F. (2) 796.

(6) The Trial Court by denying petitioner's motion for the withdrawal of a juror and declaring a mistrial by reason of comments of Juror Number 4, which the Trial Court labelled improper, deprived your petitioner of his constitu-

tional rights to a trial by an impartial jury by reason of such misconduct (R. 267-275). *Sunderland* v. *U. S.*, 19 Fed. (2d) 202, 212.

(7) The defendant was not granted a fair and impartial trial in that the Trial Court permitted (a) grossly improper and prejudicial cross examination of character witnesses, *Sloan* v. *U. S.*, 31 Fed. (2d) 902; *Pittman* v. *U. S.*, 42 Fed. (2d) 793, (b) the cross examination, over objection and exception of petitioner, of the witness Palmer which related to separate, distinct, disconnected and irrelevant matter, and while permitted on the Government's claim that the testimony was for the purpose of affecting the credibility of the witness, the effect thereof was highly prejudicial in that there was a complete failure to discredit the witness yet there was imputed both to the defendant and said witness the commission of a crime not mentioned or described in the indictment, *Gart* v. *U. S.*, 294 Fed. 66; *Manning* v. *U. S.*, 287 Fed. 800, (c) having granted petitioner's request to charge No. 32, committed error by its refusal to charge request No. 31 as the corollary thereof, since the combined effect of the charge and refusal was to instruct the jury substantially that even if petitioner believed that he had a right to correct his testimony and gave his testimony in good faith and in reliance thereon, all of which would negative the criminal intent and corrupt motive which are essential ingredients of the crime of perjury, the jury must nevertheless convict if they found as a fact that the agreement claimed was not entered into, and (d) evidence of defendant's conduct subsequent to the date of the alleged commission of the crime which was highly prejudicial and tended to inflame the jury since it imputed the commission of other crimes unconnected with the crime charged in the indictment. *Gordon* v. *U. S.*, 254 Fed. 53; *Weil* v. *U. S.*, 2 Fed. (2d) 145.

WHEREFORE, your petitioner respectfully prays that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

Dated: New York, N. Y., May 27th, 1940.

JOSEPH J. MASCUCH,
Petitioner.

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